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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

JOHNIE THROCKMORTON,
Petitioner,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

No. 683

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Eighth Circuit on January 13, 1950, affirming a judgment rendered in respondent's favor by the United States District Court for the Eastern District of Missouri, and denying petitioner's motion filed under Rule 75 (h) of

the Federal Rules of Civil Procedure. Petitioner's action in the District Court was instituted under the Federal Employers' Liability Act.

OPINION BELOW.

The opinion of the Court of Appeals is printed in the record at page 327, and is reported in 179 F. 2d 165.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Title 28, U. S. Code, Section 1254 (the Revised Judicial Code). Application for stay of mandate pending application to this Court for writ of certiorari was made on January 28, 1950, and an order staying the mandate was entered on January 30, 1950 (R. 338).

QUESTION PRESENTED.

Is it reversible error for the trial judge to communicate with and instruct the jury ex parte during the jury's deliberations without notice to the parties or their counsel, and without opportunity for the parties or their counsel to object to such communication?

SUMMARY STATEMENT.

Petitioner, plaintiff in the District Court, instituted an action under the Federal Employers' Liability Act, 45 U. S. C., Section 51 et seq., to recover for injuries sustained by him as a switchman while in the employ of respondent and alleged to be due to a violation by respondent of the Federal Safety Appliance Act, 45 U. S. C., Section 11 (R. 1-3).

The jury returned a verdict in respondent's favor, judgment was entered thereon, petitioner's motion for a new trial was denied, and the cause was appealed by petitioner to the Court of Appeals (R. 316-318).

While the appeal was pending, and prior to its argument and submission, petitioner moved for an order: (1) continuing the argument and submission of the case; and (2) granting petitioner leave to present to the District Court a motion to correct and supplement the record on appeal and to certify and transmit to the Court of Appeals a supplemental record (R. 320).

In support of this motion petitioner submitted three affidavits, one from the foreman of the jury and two from members of the jury (R. 321-33). In his affidavit, which was fully supported by the other two affidavits, the foreman stated that, on the morning the verdict was rendered, he had brought to the jury room from his shop a magnifying glass wrapped in paper; that he had suggested to the other jurors that this glass be used to examine the photographic exhibits in the case in order to assist in a determination whether the appliance in question was defective; that, at the suggestion of the other jurors, the foreman addressed a note to the trial judge requesting permission for such examination; that the judge endorsed upon this

note the words "You may do so," and returned the note to the foreman; and that such examination was thereupon made by the jury in the jury room. These facts were not discovered by petitioner until the appeal had been docketed.

All this had occurred without notice to petitioner or his counsel, and without their knowledge; and was, therefore, completely ex parte. Petitioner's motion was filed pursuant to Rule 75 (h) of the Federal Rules of Civil Procedure. Marron v. Atlantic Ref. Co., 176 Fed. 313.

Action on this motion was postponed by the Court of Appeals until its action on the merits, and, following the opinion of the appellate court affirming the judgment of the trial court, the motion was denied and the judgment finally affirmed (R. 337). Subsequently, petitioner in order fully to protect his rights filed a motion in the trial court for relief under Rule 60, which motion was summarily denied; the denial was appealed, and the second appeal, now pending before the Court of Appeals, has been continued until this Court has acted upon petitioner's application for writ of certiorari.[1]

The Court of Appeals, in its opinion denying the motion and affirming the judgment of the trial court, assumed the facts set forth by counsel for petitioner as stated in the affidavits, and, on that assumption, stated, without reference to the authorities or supporting reasons, that the action of the trial judge was "not erroneous or prejudicial" (R. 336).

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1 The record in the second proceedings is filed as a supplement to the record in the original appeal.

REASONS FOR GRANTING THE PETITION.

1. The Court of Appeals has rendered a decision in conflict with the decisions of Courts of Appeals in other circuits upon the same matter.

The decision of the court below is in conflict with the decision of the Court of Appeals for the Third Circuit in **Arrington v. Robertson,** 114 F. (2d) 821, and with the decision of the Court of Appeals for the Tenth Circuit in **Parfet v. Kansas City Life Insurance Co.,** 128 F. (2d) 361.

In the latter case, the question for the jury was whether the assured had died by suicide. After retiring for their deliberations, the jury handed to the bailiff a note, inquiring of the trial judge whether it was necessary that a motive be shown by the evidence for the jury to find that there was suicide. The trial judge directed the bailiff to tell the jury orally "No". Conceding that this communication was a correct statement of the law, the Court of Appeals reversed the judgment of the trial court, stating:

> "But where a case has been submitted to the jury and in the course of their deliberations the jury request additional instructions, such instruction should be given in the presence of the parties or their attorneys, or after notice and opportunity for them to be present. It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice or opportunity to be present, even though substantial prejudice is not affirmatively shown." 128 Fed. 2d at 362.

It is clear that this decision is in square conflict with that of the court below.

Indeed, the instant cause presents an even stronger case for granting the relief sought by petitioner in his motion. In the **Parfet** case it was conceded that the communication made by the trial court to the jury embodied a correct statement of the law. In the instant case, there is no possible method of determining the correctness of the jury's request or extent to which petitioner was prejudiced by the trial judge's action. It may be conceded that under certain circumstances it might have been proper for the jury to examine the exhibits with the aid of a magnifying glass. This assumes, however, that the glass was a good one, capable properly of reflecting to the jury the face of the exhibits. Petitioner or his counsel was entitled to examine the glass in order to ascertain whether its use was objectionable on this or some other ground. Furthermore, it may well have been the court's duty to admonish the jury as to the limited reliance which could be placed upon such a device; and petitioner was entitled to an opportunity to request the court to give such an admonition.

Such considerations give force to the rule which requires all proceedings to be had in the presence of the parties or their counsel. They indicate the possible prejudice which petitioner may have sustained as a result of the ex parte action of the trial judge. The **Parfet** case holds that no showing of prejudice is required. The instant case is a stronger one.

In the **Arrington** case, the trial court, pursuant to an inquiry from the jury, sent to it instructions in writing embodying two points in the charge which had already been given to the jury, though excepted to by appellants. To the contention that these instructions correctly applied the law of the case, the appellate court replied:

> "In our view, however, their accuracy as abstract statements of the law is immaterial." 114 F. 2d at 820.

The Court further stated, in reversing the judgment of the trial court:

> ". . . the parties are entitled to anticipate . . . that all such proceedings will take place in open court in the courtroom assigned for the trial and will be reported by the court stenographer." 114 F. 2d at 823.

Apropos of the argument relied on by the Court of Appeals in the instant case, Judge Maris stated on behalf of the court in the **Arrington** case:

> "The record does not disclose the phraseology of the jury's question. Consequently we cannot know whether the instructions given, even though entirely sound as abstract legal statements, were appropriate to answer it, or whether additional instructions, appropriate and indeed necessary to supplement those given, might not have been suggested to the trial judge by counsel for the defendant if he had been given the opportunity to be present." 114 F. 2d at 823.

No squarer conflict between courts could be presented than that between the holding of the court below and that of the Tenth and Third Circuits in the two cases above cited. The only possible distinction which we can imagine is the contention that in the **Parfet** and **Arrington** cases the courts were dealing with instructions of law, whereas in the instant case the court below was dealing with only a request for permission to examine the exhibits in a particular way. Such a distinction has no basis. In the case at bar the Court, in effect, instructed the jury that it was authorized to do a particular thing. The principle of law is the same: that the parties have a legal right to know what transpires between judge and jury, and to present their objections in open court to the propriety of any communication between them; and this right cannot be drained

of its substance by post hoc speculations as to the prejudice which may have resulted from its violation.

2. The holding of the court below seems to conflict with that court's own decision in Wheaton v. United States, 133 F. 2d 522. In that case, while the jury was deliberating, a written message was delivered by the bailiff from the foreman of the jury to the trial judge, and it was claimed that the bailiff, after talking with the judge, made certain statements to the jury as to the manner in which the jury might or should consider the various counts in the indictment. On the other hand, the bailiff, though admitting the communication, asserted that he was merely conveying to the jury the trial judge's reiteration of instructions already repeatedly given the jury. The Court of Appeals nevertheless remanded the case for a fresh determination by the trial court on the basis of testimony rather than affidavits, whether the communications admittedly made were prejudicial, with the burden of proof on the appellee.

In the **Wheaton** case the Eighth Circuit, following its own prior holding in **Sunderland v. United States**, 19 F. 2d 212, adhered to the view that ex parte communications to the jury are presumed to be prejudicial but that this presumption is rebuttable; and that the proper procedure is to remand for a determination of prejudiciality vel non by the trial court with the burden of proof on the appellee. In so holding, the Eighth Circuit admitted a conflict between its decisions and those of other jurisdictions, including the Tenth Circuit.

In the instant case, the court below departed sub silentio from the **Wheaton** case and refused even to remand the issue for the taking of proof. In so doing, the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings so as to call for an

exercise of this court's power of supervision. This is an additional reason why the writ should issue.[1]

3. The court below has decided a federal question in a way probably in conflict with applicable decisions of this court, and more especially with the decision of this court in **Fillipon v. Albion Vein Slate Co.**, 250 U. S. 76, 63 L. Ed. 853.

In that case the jury had retired, and in response to a written request the trial court gave the jury a supplemental instruction in writing. His action in so doing was held by this court to constitute reversible error. The court, speaking through Mr. Justice Pitney, stated:

> "In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity to be present or to make timely objection to the instruction." 250 U. S. 81, 63 L. Ed. 856.

To the argument, identical with that offered by the court below in the instant case, that such conduct was not reversible error unless the instruction was erroneous or prejudicial, the court said:

> "It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling of convinced of error." 250 U. S. at 82, 63 L. Ed. at 856.

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1 Decisions of many State Courts to the same effect are collected in 17 L. R. A. (N. S.) 609 and 16 Anno. Cases 1133.

Though the court went on to hold that in fact the instruction given in the **Fillipon** case was erroneous, the manner of its giving was in itself held to be reversible error. See **Shields v. United States**, 273 U. S. 583, 588, 71 L. Ed. 787, where the holding of the **Fillipon** case was authoritatively construed on this court's behalf by Chief Justice Taft.

The decision of the court below cannot be reconciled with the holding of this court in the **Fillipon** case. Even if one accepts the view that such error is only rebuttably presumed, the court below was wrong, since on that view the case should have been remanded to the trial court for a determination of prejudiciality.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Court of Appeals for the Eighth Circuit should be granted.

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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

No. 683.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in this case is reported at 179 F. (2d) 165.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under Title 28, U. S. Code, Section 1254.

QUESTION PRESENTED.

The statement under "Question Presented," appearing at page 2 of the petition herein, does not properly nor accurately convey to the Court the question here involved. There is no question here involving **instructions** to a jury **ex parte** during the jury's deliberations. Instructions are not here involved and the occurrence was not ex parte. The sole question presented is simply: Is the decision of the United States Court of Appeals for the Eighth Circuit, holding in part that plaintiff was not prejudiced by the trial court's action in advising the jury that they might use a magnifying glass to examine exhibits, in conflict with the decisions of courts of appeals in other circuits or with decisions of this court.

ARGUMENT.

I.

The decision of the Eighth Circuit Court of Appeals in this case is not in conflict with the decisions of Courts of Appeals in other circuits on the same matter.

The decision is not in conflict with the decision of the Court of Appeals for the Third Circuit in **Arrington v. Robertson, 114 F. (2d) 821**, and is not in conflict with the decision of the Court of Appeals for the Tenth Circuit in **Parfet v. Kansas City Life Insurance Company, 128 F. (2d) 361**, because:

(A) The giving of supplementary instructions to the jury after it was deliberating on its verdict, not in open court, and in the absence of counsel, was involved in the foregoing cases; no such question is here involved. The question in this case involves the examination of exhibits with a magnifying glass; no question of supplementary instructions is present.

In the case at bar defendant furnished plaintiff a picture of the end of the tank car showing the hand brake thereon, which was marked Plaintiff's Exhibit 3 (R. 11, 275); a photographer enlarged a portion of the picture so furnished and it was marked Plaintiff's Exhibit 4 (R. 9, 10, 13). These exhibits were introduced and received in evidence (R. 10, 15). Plaintiff in the trial court contended that these exhibits showed that the brake there displayed was defective (R. 84, 90, 97, 100). A few days before this case was argued in the Court of Appeals, counsel for appellant filed the motion, with affidavits attached, which appears at pages 320-326 of the record. The Court of Appeals, in its opinion, assumed the truth of the allega-

tions and statements set forth in the motion and affidavits. The occurrence, then, of which petitioner complains, is this: The jury, by a note addressed to the trial judge, asked for permission to use a magnifying glass to examine the exhibits. The court replied by note: "You may do so." This, in the absence of counsel for both parties—not ex parte, as stated by petitioner.

There were no supplementary instructions sent to or read to the jury. Thus, an entirely different situation exists in the case at bar than that posed by the records in the cases cited by petitioner in his petition herein. The occurrence in the case at bar is the kind of thing which appellate courts describe and treat as a mere informality and in such situations it can be affirmatively determined from the record that no prejudice resulted to Appellant.

In **United States v. Compagna et al., 146 F. (2d) 524**, the Court of Appeals for the Second Circuit dealt with a comparable situation. In that case after the jury retired it sent a note to the trial judge asking that certain testimony be read to it. The judge went to the jury room to find out just what the jury wanted, and while in the jury room told the jury that the testimony requested would be read when the jury returned from lunch. Concerning the visit of the judge, the court said:

> "As to the visit of the judge, it is true that courts are extremely jealous of anything of the kind, once the jury has been locked up; and we do not wish to abate that jealousy in the least; it is most undesirable that anything should reach a jury which does not do so in the court room. This is, indeed, too well settled for debate. • • • (Citing cases) • • •. But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm

has been done, it would be the merest pedantry to insist upon procedural regularity. Dodge v. United States, supra, 258 F. 300, 7 A. L. R. 1510; Rice v. United States, 2 Cir., 35 F. 2d 689, 696; United States v. Graham, 2 Cir., 102 F. 2d 436, 444. There cannot be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused" (146 F. 2d 528).

In **Philadelphia and R. Ry. Company v. Skerman, 247 F. 269,** when the jury retired to deliberate it was furnished forms of verdict, one for a finding for plaintiff and the other for a finding for defendant; thereafter the trial court sent to the jury, in the absence of counsel, additional forms of verdict providing for a finding for plaintiff on the question of residence and for a statement by the jury that the jurors had agreed on the issue of negligence and providing for a statement by the jury that it had not agreed on the question of negligence. The court said at p. 272:

> "If what the judge did was irregular, it was in no way calculated to influence the jury nor prejudicial to the defendant. He gave them no instructions, and as we are satisfied that the jury were correctly advised as to the law of the case the judgment is affirmed."

The most that can be said of the action of the trial court in the case at bar is that it was an informality. It could not and did not prejudice the plaintiff. It is in no sense comparable to the question which arises in cases in which supplementary instructions on the law of the case are given by the court to the jury in the absence of counsel and not in open court. The rules of law announced in cases involving supplementary instructions are not applicable to the case at bar.

(B) Even assuming, however, that the cases involving supplementary instructions are applicable to the situation shown in the case at bar, nevertheless, the **Arrington** and **Parfet** cases, supra, are not in conflict with the opinion and decision in the case at bar. In the **Arrington** case the court made it very clear that it was dealing **only** with the question of supplementary instructions in writing to a jury. Such is demonstrated by the court's language at p. 822, where the court said:

> "The **sole question** presented on this appeal is whether it was reversible error for the trial judge, in the absence of counsel for the parties and without notice to them, to send **instructions in writing** to the jury, pursuant to an inquiry by them, after they had retired from the courtroom and while they were in the jury room deliberating upon their verdict." (Emphasis ours.)

The Court further clearly demonstrated that the reason it held the action of the Trial Court to be error was that the Appellate Court could not determine from the record whether the answer of the trial judge to the jury's question was or was not appropriate. The Appellate Court in the Arrington case very clearly indicated by its language, at p. 823 of the opinion, that if that Court could have determined from the record that the instructions were appropriate and complete and had resulted in no prejudice, then the case would not have been reversed.

Likewise, in the **Parfet** case, supra, the other case relied on by petitioner, the Court there indicated that it was dealing **only** with supplementary instructions. The Court, at p. 362 of the opinion, said:

> "It is error for the Court to receive a communication of **this** kind from the jury and make reply thereto in the **form of an additional instruction** in the ab-

sence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not **affirmatively** shown." (Emphasis ours.)

The Appellate Court went on to indicate, however, that if, as contended by respondent in that case, it had affirmatively appeared that any error in the additional instruction or in the manner in which it was given was harmless, then it would not have reversed the case. That this is the conclusion of the Court is demonstrated by the opinion at p. 362. The Court there considered the contention of respondent and concluded:

"Taken as a whole and fairly construed, the evidence did not conclusively establish suicide."

The Court in the **Parfet** case held that under that particular record they could not say that the record showed that the additional instruction was necessarily harmless.

As a matter of fact, it is settled law that even in criminal cases, involving the giving of supplementary instructions, an error which has not affected the substantial rights of an appellant will be disregarded. In the case of **Little v. United States, 73 F. (2d) 861,** the Court sent a stenographer into the jury room to read the Court's charge, in the absence of defendant and his counsel. While the Court held that under the record there it could not determine that the action of the trial court was harmless, nevertheless, the Court also said at p. 866 of the opinion:

"We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded."

The **Little case** is by the same circuit as the **Parfet case,** supra, and demonstrates conclusively that the decision in

the **Parfet case** does not mean, as petitioner contends, that under circumstances where the record shows that no prejudice resulted to appellant that a case will be reversed; and this, we repeat, even where supplementary written instructions on the law have been given to a jury deliberating on its verdict, in the absence of counsel and not in open court. This same doctrine is recognized in the Eighth Circuit, as demonstrated by the opinion in **Ray v. United States, 114 F. (2d) 508**, where at p. 513 the court said:

> "However, if the record shows affirmatively that appellant was not prejudiced, then the error does not require reversal." (Citing many cases.)

The record in the case at bar affirmatively shows that no prejudice resulted to appellant; it was certainly proper to send exhibits to the jury room; it was proper to use a magnifying glass in examining the exhibits. **64 C. J., Sec. 827, p. 1033.** It was obvious to the Court of Appeals from the record in this case that the permission of the trial court to do a thing which the jury had a right to do and which examination by the jury could only magnify and amplify a defect claimed by Appellant, could result in no possible prejudice to Appellant. The Eighth Circuit, in so holding, in no possible way decided contrary to the decisions cited by petitioner.

The suggestion in petitioner's "reasons" (p 6), that counsel for plaintiff had a right to examine the magnifying glass is obviously without substance. There is no more reason to examine a magnifying glass than to make an examination of the glasses worn by particular members of every jury in every case. Eye glasses are themselves, in most instances, magnifying glasses. If a juror leaves his own glasses at home and borrows the glasses of a fellow juror to examine an exhibit that he may better

see it, would counsel suggest that a determination should first be made as to the exact image that the borrowed glasses would reflect? The fact of the matter is that the only purpose a magnifying glass could serve, irrespective of the type, make or model, would be to magnify and make more apparent the claimed defect in the brake which **plaintiff** contended at the trial existed and which **plaintiff** contended was displayed on the exhibits in question. Permission to use a magnifying glass to examine exhibits is in the same category with permission to replace a 60 watt bulb with a 100 watt bulb in the jury room, or with permission to a juror to send to his home to get his "reading glasses" so that he might use those particular lenses rather than the lenses in the "walking glasses" which he had on at the time he retired to deliberate on his verdict.

II.

The decision in the case at bar is not in conflict with the decision of the Eighth Circuit in **Wheaton v. United States, 133 F. (2d) 522.**

An examination of the opinion in that case will demonstrate that it was because the Court could not determine on the record there whether prejudice had resulted that it remanded the case to the trial court to make that determination. The Eighth Circuit in the **Wheaton** case did not, by any stretch of imagination, hold that where the record affirmatively shows no prejudice has resulted that it would do a needless and futile thing and remand the case for additional proof. We find nowhere in the opinion in the **Wheaton** case an admission by the Eighth Circuit that its opinion there was in any wise in conflict with any decision of the Tenth Circuit, as contended by petitioner at page 8 of his petition. The Eighth Circuit, in the case at bar, did not depart sub silentio or otherwise

from the **Wheaton** case, but rather applied its rule announced in **Ray v. U. S.**, supra.

III.

The decision in the case at bar is not in conflict with the applicable decisions of this Court and especially not in conflict with the decision of this Court in **Fillipon v. Albion Vein Slate Co.**, 250 U. S. 76, 63 L. Ed. 853.

In the **Fillipon** case this Court at page 82 specifically held that where it affirmatively appears that a supplementary instruction is harmless that a reversal is not required. Witness the language of the court, page 82:

> "And, of course, in jury trials, erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

The Court in that case went on to consider whether the supplementary instruction given was erroneous and determined that it was and reversed the case. This Court and the Courts of Appeal heed the provisions of Rule 61, Fed. Rules of Civil Procedure (governing trial courts), to disregard any defect which does not affect the substantial rights of the parties and a cause will not be reversed or sent back to the trial court for technical errors not affecting the substantial rights of the parties. Alleged errors which relate to merely formal or technical matters are not grounds for appellate action and even if the alleged error is not a mere formality, if it appears from the entire record that it was harmless and did not prejudice the rights of the complaining party, it is not reversible error.

CONCLUSION.

The Court of Appeals for the Eighth Circuit had the duty to determine and did determine that on the record in this case the action of the trial court in advising the jury that they might use a magnifying glass to examine exhibits could not and did not result in prejudice to Appellant, and in so holding that Court rendered a decision not in conflict with, but in accord with, the decisions of Courts of Appeal in other Circuits and the decisions of this Court. The permission by the trial court was at most an informality.

For the Court of Appeals to have sent this case back to the trial court to determine whether Appellant was prejudiced, when the Appellate Court determined from the motion and affidavits that no prejudice resulted, "would be the merest pedantry," a futile, a useless procedure.

Wherefore, it is respectfully submitted that the petition herein for a writ of certiorari should be denied.

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